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FILED
JUL 17 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ETC., ET AL., *Appellants,*

vs.

CITY OF DETROIT, A MUNICIPAL CORPORATION, ETC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OF THE CITY OF DETROIT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, INDIVIDUALLY AND AS PRESIDENT OF SAID DIVISION 26, ROBERT HOLLOWAY, INDIVIDUALLY AND AS VICE-PRESIDENT OF SAID DIVISION 26, WALTER STANLEY, INDIVIDUALLY AND AS BUSINESS AGENT OF SAID DIVISION 26, JOHN FRANCIS, INDIVIDUALLY AND AS SECRETARY-TREASURER OF SAID DIVISION 26, IVOR E. MULLINS, INDIVIDUALLY AND AS SERGEANT-AT-ARMS OF SAID DIVISION 26, GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, INDIVIDUALLY AND AS BOARD MEMBERS OF SAID DIVISION 26, *Appellants,*

vs.

CITY OF DETROIT, A MUNICIPAL CORPORATION, ETC., ET AL.

STATEMENT OF APPELLEE, CITY OF DETROIT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM AND PROOF OF SERVICE

STATEMENT OF APPELLEE, CITY OF DETROIT, OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Comes Now the appellee, City of Detroit, a municipal corporation, by and through Fred P. Sisson, Rodney Baxter

and Herman L. Moekle, as and constituting the Board of Street Railway Commissioners of the City of Detroit, and files its statement in opposition to appellants' statement as to jurisdiction and hereby moves the Court to dismiss the appeal herein or affirm the decision and decree of the Supreme Court of Michigan, from which said decision and decree said appeal is taken.

THIS APPEAL RAISES ONLY THREE QUESTIONS, ALL AS TO THE CONSTITUTIONALITY OF THE HUTCHINSON ACT, ACT 336 OF THE MICHIGAN PUBLIC ACTS OF 1947, NO ONE OF WHICH THREE IS A SUBSTANTIAL FEDERAL JURISDICTIONAL QUESTION.

I

Facts, Issues and The Hutchinson Act

(A) Facts

Appellants have admitted that they struck under such circumstances as are prohibited by the Hutchinson Act; have admitted stopping transportation service in Detroit for days; have admitted being found by the City to have violated the law and to have terminated their employment; and have admitted that they were discharged under the common law and civil service and were offered hearings (R. 71-74).

Appellants have never claimed, and do not here, claim that thereafter Appellants sought and were denied any hearings, or had hearings, or appealed therefrom; nor do they now claim here that their striking was not forbidden by the Hutchinson Act, if valid.

(B) Issues

Appellants here rely solely on the bare claims that the Hutchinson Act violates the Federal Constitution's provisions as to:

(1) due process,
(2) equal protection, and
(3) bills of attainder.

These three claims of unconstitutionality of the Act, Appellants have further restricted by saying:

> "No statute similar to the Hutchinson Act has come to our attention save in those several states where practically identical statutes have been adopted. We are not here asserting a right to strike on the part of municipal employees. We are assuming that its prohibition is within the legislative powers of the state. But for the statute to *operate directly* upon the employees, without regard to the desires of their employer, or much less, any decision of an impartial tribunal, and impose 'disciplinary action' and 'penalties' for striking seems to us arbitrary, and clearly in violation of the constitutional provisions invoked."
> (*Appellants' Jurisdictional Statement*, p. 27.)

(C) The Hutchinson Act

(1) *The Act Itself Does Not "Operate Directly" on Anyone*

The Hutchinson Act itself does not declare that any particular individual or any particular class of individuals has struck.

The Act merely forbids a public employee to strike; requires that striking terminates his job and its emoluments unless (a) he is reinstated, which can only be by hearing, or (b) he is reappointed, which must be without a pay raise for one year and without tenure for two. It affords him (1) a

right to establish, by request and hearing, that he did not strike and thus it affords him an opportunity for reinstatement, and (2) a right to another hearing by the Michigan Labor Mediation Board.

It does not bar his common law rights to appeals by certiorari from either hearing to the courts.

Since 1947 the Hutchinson Act had been the law, and had not, in and of itself, discharged, operated directly on, or ever affected anyone; until Appellants themselves, knowing that under the Act their striking would be an abandonment of their employment, deliberately did the very thing which first brought the Act into operation, and they thus deliberately abandoned their employment and discharged themselves. The Act itself did not discharge them.

The Act cannot itself discharge, operate upon, or affect, any public employee until he strikes. Then the Act says that he "shall be deemed on strike" (Sec. 6)—by those public officials whose duties require that normally they either (a) "deem" him to be, and treat him as, an employee to carry out public business, or (b) "deem" him not to be an employee and then hire someone else to continue the public business. To this extent, in the first instance, the officials must decide the question as to whether the employee did or did not strike. If the officials decide that the employee did strike, then the law first operates upon him and says the officials must treat his employment as terminated.

Thus, for the Act to "operate" at all—first the employee must strike. Then the Act requires the public officials to decide that he struck from which decision termination of employment follows.

Therefore the Hutchinson Act itself does not operate directly on anyone.

The Statute Does Not "Operate • • • Without • • • Any Decision of an Impartial Tribunal"

From this decision that the employee struck, he can appeal by hearing, and then also he can again appeal to the Labor Mediation Board for another hearing—from either of which hearings there is the further appeal to the courts by certiorari.

The statute provides for these two hearings and does not affect the common law right of appeal by certiorari to the courts.

The Statute Does Not Entirely "Operate • • • Without Regard to the Desires of Their Employer"

The Act requires that, in the first instance, the public officials make a finding as to whether or not the employee struck and then requires that if he struck, his employment terminate; but it affords the employee a hearing by the officials on this finding. It also permits the officials, regardless of any decision on that hearing that the employee did strike, to re-hire the striker at pre-strike pay for one year and without tenure for two. Thus the "employer", even in rigid obedience to the Act, is not required by the Act to discharge anyone who does not strike, nor to refuse re-employment to one who has struck.

"Disciplinary Action" and "Penalties"

The Act imposes no "disciplinary action" or "penalties" except (1) the above discharge, which is subject to hearings and appeals to the courts, and (2) the above conditions of the striker's re-employment—both of which are only the means which the Legislature thought reasonable and necessary, in the exercise of police powers, to discourage public employees striking.

The Act, in Operation, Is Not "Arbitrary"

The Act is far less "arbitrary" than Appellants' voting not to arbitrate but to strike in violation of it, a vote described by their Business Agent as follows:

> "The vote that was taken was whether to arbitrate the entire contract or strike the property. The vote that was taken expressed the wish of our men not to arbitrate the entire contract, but failing to get what they thought they were fairly entitled to, to strike the property" (R. 195).

Nor is the Act as "arbitrary" as those strikers greatly inconveniencing the public in Metropolitan Detroit for 59 days.

II

Appellants' Claim That the Hutchinson Act Violates Due Process, Raises No Substantial Federal Constitutional Question.

(A) Appellants Never Had Any Constitutional "Property" or Other "Rights" in Their Jobs and so the Act Did Not Deprive Them of Any Such "Rights"

Appellants have disclaimed "a right to strike on the part of municipal employees", and admit that the State can forbid such strikes; but they still claim a constitutional "property" right under "due process" to retain their positions while striking.

To violate the due process clause, there must be a deprivation of life, liberty or property. There is no such deprivation in the case before this Court. The Hutchinson Act, in placing restrictions on further public employment of those who violate its mandates, deprives the former employee of no right within the meaning of the due process clause.

Before the Hutchinson Act, at common law, a public employee who struck could be discharged. He had no constitutionally-guaranteed "property" or "contract" "rights", owed him as an "obligation of contract", to retain his job while striking. *Goodfellow* v. *Detroit*, 312 Mich. 226.

Such non-existing constitutional "rights" could not be taken away by the Hutchinson Act.

The Act merely forbids a public employee to strike (which before the Act, was illegal); requires that his striking terminates his job and its emoluments (which, before the Act, his striking could constitutionally terminate); imposes two new conditions, no pay raise for one year and no tenure for two, on his re-employment (which re-employment, before the Act, constitutionally could have been absolutely denied him, or granted him on these two, or any, conditions). The Act also affords him the new rights (not had by common law) to establish, by requested hearings and by appeals that he did not strike.

If the people's established governments are limited by such claimed constitutional "rights" and therefore are forbidden by the Federal Constitution to so legislate,—if the people cannot replace publicly employed strikers to continue the necessary activities of government but must indefinitely suspend all activities of government until the strikers possibly may be pleased to reaccept their jobs and job rights—then all activities of government must stop and eventually government itself must utterly cease.

In *United Public Workers* v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. 754, a suit to enjoin enforcement of, and to have declared unconstitutional, that portion of the Hatch Act which forbids Federal employees "to take any active part in political management or political cam-

paigns"—the United States Supreme Court affirmed summary judgment for defendants, saying:

> "Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes. The requirements of residence and age must be met. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." (330 U. S. 95-96, 67 S. Ct. 567, 91 L. Ed. 770-771).
>
> "To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system." (330 U. S. 99, 67 S. Ct. 569, 91 L. Ed. 772).
>
> "We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. • • • When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need.

We cannot say with such a background that these restrictions are unconstitutional." (330 U. S. 102-103, 67 S. Ct. 571, 91 L. Ed. 74).

In *Bailey* v. *Richardson*, 182 Fed. 2d 46 (Aff. Mem. Op. 341 U. S. 918, 71 S. Ct. 669, 95 L. Ed. 1352), Dorothy Bailey, a member of the Federal classified civil service, was laid off and then reinstated subject (by civil service regulation) to removal if in the next 18 months investigation might disclose her disqualification. In that time investigation disclosed evidence of reasonable grounds for believing her disloyal. A Regional Loyalty Board finding that such grounds existed, on appeal was sustained by a panel of the Loyalty Review Board, whose Chairman so advised the Federal Security Agency and requested the Agency to remove her. The full Loyalty Review Board declined to reverse the panel's decision. Miss Bailey sought a Federal District Court declaratory judgment against these Federal agencies, claiming violation of due process in her being deprived of her job without a judicial hearing. The Federal Agencies moved for, and received, a declaratory judgment, which the Columbia Circuit Court of Appeals sustained as against claims of due process being violated, saying:

"Even in normal times and as a matter of ordinary internal operation, the ability, integrity and loyalty of purely executive employees is exclusively for the executive branch of Government to determine, except in so far as the Congress has a constitutional voice in the matter. All such employees hold office at the pleasure of the appointing authority; again except only for statutory limitations. Never in our history, even under the terms of the Lloyd-Lafollette Act (infra, Note 8), has a Government employee been entitled as of right to the sort of hearing Miss Bailey demands in respect to dismissal from office. These well-established principles give perspective to the present problem." (182 Fed. 2d 51).

> "• • • It has been held repeatedly and consistently, that Government employ is not 'property' and that in this particular it is not a contract. We are unable to perceive how it could be held to be 'liberty'. Certainly it is not 'life'. So much that is clear would seem to dispose of the point. *In terms the due process clause does not apply to the holding of a government office.*" (182 Fed. 2d 57).

The Court, discussing the nature of government employment and the tenure applicable thereto, says that offices are held at the will of the appointing officer, not for life or for fixed terms, and concludes that a decision that removal from an office held at the will of a superior, requires due process of law, would put together two opposite and inherently conflicting ideas. The Court says:

> "• • • Due process of law is not applicable unless one is being deprived of something to which he has a right." (182 Fed. 2d 58).

In *Garner* v. *Board of Public Works,* 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317, the Court sustained as valid (1) a 1941 City Charter provision which forbade the obtaining or retaining of City employment by anyone who in the past five years has been, or now is, or may in the future be, guilty of advocating or belonging to a group advocating forceful overthrow of the Federal or State governments, and (2) a 1949 ordinance requiring of each City employee an oath that (in effect) he had not been, is not, and will not be such an advocate or member. The Court said:

> "We assume that under the Federal Constitution the Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable

regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. Gerende v. Board of Supervisors of Elections, 341 U. S. 56, ante, 745, 71 S. Ct. 565 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, United Public Workers v. Mitchell, 330 U. S. 75, 102, 103, 91 L. ed. 754, 774, 775, 67 S. Ct. 556 (1947), and a state is not without power to do as much.

"The Charter amendment defined standards of eligibility for employees and specifically denied city employment to those persons who thereafter should not comply with these standards. While the amendment deprived no one of employment with or without trial, yet from its effective date it terminated any privilege to work for the city in the case of persons who thereafter engaged in the activity proscribed." (341 U. S. 720-721, 71 S. Ct. 913, 95 L. Ed. 1323).

In *Washington* v. *McGrath*, 84 Fed. Supp. 964 (Aff. 186 Fed. 2d 375, Aff. Mem. Op. 341 U. S. 923, 71 S. Ct. 795, 95 L. Ed. 1356), plaintiff postal employees sought a Federal District Court injunction against enforcement of executive orders for administration of employee loyalty program as unconstitutional. The District Court dismissed the complaint, saying:

"The other objections are to the effect that the Order does not accord due process to the employee before he is discharged. True, if the requirements of due process laid down by the Fifth Amendment of the Constitution of the United States were applicable to the discharge of a Government employee from the service, this order would not comply with those requirements. The type of hearing contemplated by the Order is not the type of hearing that is prescribed by the

due process clause. But the requirements of the due process clause apply only to judicial proceedings and to proceedings of a quasi-judicial nature. They do not apply to the employer-employee relationship as between the Government and its employees. An employer does not have to grant to his employee a formal trial, with all its pomp and circumstance, before discharging the employee. This applies equally as well to the United States as an employer." (84 Fed. Supp. 967).

The dismissal was sustained by the Columbia Circuit Court of Appeals (182 Fed. 2d 375) on the authority of *Bailey* v. *Richardson, supra,* and other cases (182 Fed. 2d 376).

Jeffries v. *Election Commission,* 294 Mich. 255 (cited and followed in the decision here appealed from) also subscribes to the doctrine that there is no property right in public office.

In *Norwalk Teachers' Assn.* v. *Board of Education* (dec'd 7-31-51), — Conn. —, 83 At. 2d 482 (C.C.H. Lab. Cas. No. 66543, 20 Lab. Cas. 80161) a bill for a declaratory judgment brought to establish the legality of various claimed "rights"—the Supreme Court of Errors denied any right of public employees to strike, saying:

"Under our system, the government is established by and run for all of the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle. It has been so regarded by the heads of the executive departments of the states and the nation. Most of the text writers refer to one or more of the following statements by three of our recent presidents. • • • 'There is no right to strike against

public safety by anybody, anywhere at anytime.' (Calvin Coolidge on the Boston Police strike). This same strike was characterized by President Wilson as 'an intolerable crime against civilization.' President Franklin D. Roosevelt said in a letter to the president of the National Federation of Federal Employees on August 16, 1937: 'Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees • • • (A) strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.' " (83 At. 2d 484).

"In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare." (83 At. 2d 384.)

(B) Appellants' "Rights" Are At Best Qualified and Subject to Regulation

If there could be found "life, liberty or property" in government employment, still it must be subject to regulation under the police power for the paramount public interest. (*United Public Workers* v. *Mitchell, Bailey* v. *Richardson, Garner* v. *Board of Public Works, Washington* v. *Mc-*

Grath, all supra). In *United Public Workers* v. *Mitchell, supra,* the Court said:

> "We have said that Congress may regulate the political conduct of government employees 'within reasonable limits', even though the regulation trenches to some extent upon unfettered political action. • • • When actions of civil servants in the judgment of Congress menace the integrity and competency of the service, legislation to forestall such danger and adequate to maintain its uesfulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional." (330 U. S. 102-103, 67 S. Ct. 571, 91 L. Ed. 74.)

There being no inherent constitutional "right" in public employment, and any "right" in such employment being, under the *Mitchell* case, *supra,* "subject to the elemental need for order without which the guarantees of civil rights to others would be mockery" and to the right of government "within reasonable limits" to regulate public employment and to "forestall such danger • • • when actions of civil servants menace the integrity and competency of the service • • •,"—the Hutchinson Act, justifiable for the same reasons, clearly does not violate due process.

In *International Union, U. A. W., A. F. of L., Local 232,* v. *Wisconsin Employment Relations Board* (1949), 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed 651, where the Court again conceded the right of a state legislature to mark the limits of tolerable industrial conflict in the public interest. The Court said:

> "The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental

right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the National Labor Relations Act." (336 U. S. 259, 69 S. Ct. 524, 93 L. Ed. 666.)

In *State* v. *Traffic Telephone Workers Federation*, 66 A. 2d 616 9 A. L. R. 2d 854, 2 N. J. 335, for similar reasons the Court sustained a New Jersey anti-strike statute as against charges that it violated the First and Fourteenth Amendments, saying:

"None of the provisions of the First or Fourteenth Amendments of the Federal Constitution is absolute. To quote Mr. Justice Holmes in the Hudson County Water Company v. McCarter, 209 U. S. 349, 355, 28 S. Ct. 529, 531, 52 L. Ed. 828, 832, (1908):

'All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.'

The same reasoning applies with even greater force to the broad, general constitutional guarantees asserted here. Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 (1934); Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. (Ad. Ops. 379) (1949); State Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, (E. & A. 1935).

The fact that the legislation here dealt with and the rights affected thereby involve matters arising out of labor disputes does not in anywise affect the proposition that all constitutional guarantees, like all other

rights, are subject to reasonable restraint where such restraint is deemed essential to the common good. • • •

The public utilities dealt with in the acts under review have long been held to be businesses affected with a public interest and therefore subject to special regulation by the State beyond that imposed on private industry generally. While such regulation of public utilities originally found its justification in the special franchises, often conferring monopolistic privileges, granted to them by the State, the regulation of utilities has long since found a broader justification in the necessities of our citizens for the services of these public utilities for health, safety and even life, where by reason of a strike, work stoppage or lockout the flow of the services of any of these essentials of community life is halted or impaired, the State has not only the right but a pressing duty to step in and prevent the continuance of such stoppage or impairment and to take appropriate measures to restore them. If instead of a stoppage or curtailment of essential services there is an imminent danger of their being halted or curtailed, the State has the right as well as the obligation of preventing the occurrence of such catastrophe. Cf. United States v. United Mine Workers, 330 U. S. 258, 67 S. Ct. 677, 97 L. Ed. 884 (1947).

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Within the last few months, however, the Supreme Court of the United States, speaking through Mr. Justice Black, has twice reaffirmed the protection which the Federal Constitution affords to State statutes designed to protect the legitimate interests of the State in industrial disputes. Thus in Giboney v. Empire Storage & Ice Co., 1949, 336 U. S. 490, 69 S. Ct. 684, 690, 93 L. Ed. —, it is unanimously held that 'No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society.' Again in Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Iron and Metal

Company, 1949, 335 U. S. 525, 69 S. Ct. 251, 257, 260, 93 L. Ed. —, the Supreme Court in reviewing the course of decisions in this field over the last fifteen years held: 'This Court beginning at least as early as 1934, when the Nebbia case was decided, has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See Nebbia v. New York, supra (291 U. S. 502, at 523, 524, 54 S. Ct. 505, at 509, 510, 78 L. Ed. 940, 948, 949, 89 A. L. R. 1469, and West Coast Hotel Co. v. Parrish, supra, 300 U. S. at 392, 395, 57 S. Ct. 578, 81 L. Ed. 703 (708-711), 108 A. L. R. 1330, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.' " (2 N. J. 344-348, 66 At. 2d 620-622, 9 A. L. R. 2d 863-866.)

(C) Governmental Bodies Have Constitutional Power to Adopt Regulations Prescribing Qualifications for Getting or Holding Public Employment

It is well settled law that governmental bodies have the power by general regulation, to prescribe standards of qualifications and eligibility for obtaining or continuing public employment, and in so doing violate no constitutional provision. *United Public Workers* v. *Mitchell, Bailey* v. *Richardson, Garner* v. *Board of Public Works, Washington* v. *McGrath, Norwalk Teachers' Association* v. *Board of Education, State* v. *Traffic Telephone Workers Federation, all supra; Dworken* v. *Collopy* (Com. Pl. Oh.), 91 N. E. 2d

564; *Thorpe* v. *Trustees*, 6 N. J. 498, 79 A. 2d 462; *Thompson* v. *Wallin* (N.Y.), 95 N. E. 2d 806; *Weinstock* v. *Ladisky*, 98 N. Y. S. 2d 85; *Hirshman* v. *Los Angeles County* (Cal. App.), 231 Pac. 2d 140.

Such acts are justifiable under the inherent right of government to protect and perpetuate itself. *United Public Workers* v. *Mitchell; Garner* v. *Board of Public Works; Norwalk Teachers Association* v. *Board of Education; State* v. *Traffic Telephone Workers Federation; Dworken* v. *Collopy; Thorpe* v. *Board of Trustees; Hirshman* v. *Los Angeles County; Thompson* v. *Wallin, all supra.*

In *Heim* v. *McCall*, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206, the Court held the general power of a state over its municipalities extends to the regulation of the kind of laborers which may be employed in the construction of public works; that privileges and immunities of the citizens of the several states are not unconstitutionally abridged in an act providing that only United States citizens may be employed in the construction of public works by or for the State or municipality; that property is not thereby taken without due process of law, nor the equal protection of the laws thereby denied contrary to the Fourteenth Amendment.

In *Reetz* v. *Michigan*, 47 L. Ed. 563, 23 S. Ct. 390, 188 U. S. 505, the Court said:

> "Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.
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> • • • • • • •

But while the statute makes in terms no provision for a review of the proceedings of the board, yet it is not true that such proceedings are beyond investigation in the courts. In Metcalfe v. State Bd. of Registration, 123 Mich. 661, 82 N. W. 512, an application for mandamus to compel this board to register the petitioner was entertained, and, although the application was denied, yet the denial was based, not upon a want of jurisdiction in the court, but upon the merits.

It is further insisted that it is essential to a judicial or quasi-judicial proceedings that it should give a person accused or interested the benefit of a hearing, and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. * * * If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the state courts to what exent the action of the board had deprived him of his rights.

* * * * * * *

It is further insisted that having once engaged in the practice, and having been licensed so to do, he had a right to continue in such practice, and that this statute was in the nature of an *ex post facto* law. The case of Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002, 18 Sup. Ct. Rep. 573, is decisive upon this question. The statute does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon. As shown in Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231, there is no similarity between statutes like this and the proceedings which were adjudged void in Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356, and Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

We fail to see anything in the statute which brings it within the inhibitions of the Federal Constitution, and

therefore the judgment of the Supreme Court of Michigan is affirmed."

(188 U. S. 508-510, 23 S. Ct. 392, 47 L. Ed. 566-567).

In *Local Union 876* v. *Labor Board,* 294 Mich. 629, the Michigan Supreme Court sustained as constitutional the former Michigan Labor Relations Act which then regulated labor relations of both publicly and privately owned utility employees, saying:

> "* * * A labor mediation statute concerns the welfare of the State as well as the welfare of the particular municipality. The right to pass general laws is still reserved to the legislature of the State, and consequently it is still competent for the State through the law-making body to enact measures pursuant to the police power or pursuant to other general powers inherent in the State and to require municipalities to observe the same." (294 Mich. 635-636.)

In *State Lodge F.O.P.* v. *Detroit,* 318 Mich. 182 (cert. den. 332 U. S. 818), the Lodge filed a bill to have declared null and void orders of the Detroit Police Commissioner forbidding policemen to join the Lodge and discharging two of plaintiffs' members for such membership. The bill was dismissed, the plaintiffs appealed, and the Court held that the record showed that the individual plaintiffs in joining the Lodge were guilty of insubordination; and that "the order" forbidding membership "is considered to be within the scope of authority granted under the Charter of the City of Detroit and cannot be said to be arbitrary and unreasonable. *The plaintiffs are not deprived of any constitutional rights"* (318 Mich. 189-190).

Appellants having no constitutional "property," or other rights, in their jobs, but qualified "rights" which are subject to State regulation—the Hutchinson Act, as a valid State regulation of public employment, so clearly does not violate

due process that the claim of such violation raises no substantial Federal constitutional question.

(D) "Due Process" Does Not, as Appellants Here Claim, Guarantee That Public Employees' Jobs and Job Rights Cannot Be Taken Away "Without Regard to the Desires of Their Employer."

Appellants' Jurisdictional Statement (p. 27) admits:

> "We are not here asserting a right to strike on the part of municipal employees. We are assuming that its prohibition is within the legislative powers of the State. But for the statute to *operate directly* upon the employees without regard to the desires of their employer, or much less, any decision of an impartial tribunal, and impose 'disciplinary action' and 'penalties' for striking seems to us to be arbitrary, and clearly in violation of the constitutional provisions invoked."

Appellants' claim here is that "due process" guarantees to each city employee the constitutional right to have his administrative supervisors alone decide as to whether his striking shall terminate or continue his employment; that the administrative superiors also have a similar constitutional right uncontrollable by legislation to make such decision, and that the employee has a constitutional right to a review thereof by an "impartial tribunal."

The due process clause makes no such fine distinction as to just which public officials must decide alone whether a public employee's striking ends or continues his employment. The Federal Constitution seems to leave this state matter to the States.

As a state matter, the Michigan Supreme Court in *Local Union 876* v. *Labor Board,* 294 Mich. 629, holds that the Legislature has the final word. This case sustained the validity of the Michigan Labor Mediation Act (176 P. A.

1939, Secs. 423.1-423.22a C.L. 1948), forbidding strikes in any publicly- or privately-owned utility without prior 30-day notice, a similar claim was rejected, i.e., that if the Act applied to any city-owned utility, the Act violated "home rule" provisions of the State Constitution. The Court held the Act applicable to city-owned utilities and valid, saying:

> "Defendants contend that the act cannot apply to a home rule city, and that this dispute is a matter of purely local concern over which the legislature has no control. In support of this position, many cases are cited which uphold the principle that the State through the legislature cannot control the affairs of the city or town which are purely local in character. * * *" (294 Mich. 634.)
>
> "The home rule provision of the Constitution does not deprive the legislature of its power to enact laws affecting municipalities operating under that provision except as to matters of purely local concern. A labor mediation statute concerns the welfare of the State as well as the welfare of the particular municipality. The right to pass general laws is still reserved to the legislature of the State, and consequently it is still competent for the State through the law-making body to enact measures pursuant to the police power or pursuant to other general powers inherent in the State and to require municipalities to observe the same." (294 Mich. 635-636.)

The decision vindicates the Legislature's police power—as against a local municipality's power, and thus also against the municipality's officials' power—to regulate the labor relations of the city's utilities.

Nothing in the due process clause of the Federal Constitution fixes unchangeably in the local administrative officials, rather than the State's Legislature, the sole power to decide whether the effect of a public employee striking is a termination, or a continuance, of his employment.

(E) The Act Took Away No "Right to Contract"

All City employees, including the Appellants, are appointed and employed, *not* under contract, but under the Civil Service provisions of the City Charter. All City employees are appointed and employed in the manner required by Title IV, Chapter II of the Detroit City Charter. The Charter makes no distinctions and no exceptions. While its Title IV, Chapter XIII, Sec. 3 says that the Street Railway Commission,

> "• • • shall *appoint, in accordance with the provisions of this charter relative to civil service,* such other officers, inspectors, accountants, attorneys and other agents and servants • • • as may be necessary • • •,"

this language of the Charter is identical with that used in twenty-one other places in the Charter to prescribe the method of employment of the staffs of twenty-one of the twenty-four other administrative departments of the City government, whereby the board or officer heading the department shall

> "• • • *appoint, subject to the provisions of this charter relative to civil service,* • • •."

This language appears twenty-one times in Title IV of the Charter; in Section 5 of each of Title IV's Chapters IV, V, VI, VII, IX, XI, XII, XV, XVII, XIX, XXV, XXVI, XXVII and XXVIII; in Section 3 of each of Title IV's Chapters VII, XVI and XX; in Section 8 of each of Title IV's Chapters XIV and XXII; and in Section 18 of Title IV's Chapter XXIV.

Thus the City's Street Railway Department employees are employed by the City in exactly the same manner as are the employees in every other City department except only

the Police Department, the Corporation Counsel's Office, and the Civil Service Commission itself.

This also clearly appears in the Charter's Civil Service Chapter, Title IV, Chapter II and especially in this Chapter II's Secs. 7(a), 9, 11-15 and 17.

Appellants' complaint that the Hutchinson Act interferes with a discharged striker's right to contract with the City for his services requires us to point out that Appellants themselves admit on page 6 of their Jurisdictional Statement that the last of their claimed "contracts" covered the period ending March 31, 1951, and, on page 7, that the strike was called on April 21, 1951. Thus the claimed "contracts" expired before the strike was called.

Appellants, admittedly having struck and then having been discharged under the Hutchinson Act, under civil service rules and under the common law, had no right, as against the City's wishes, to reemployment with the City. Certainly they had no Federal constitutional "contract rights" under "due process" to have re-employment at terms contrary either to the City's wishes or the Hutchinson Act, i. e., re-employment at more than pre-strike pay and with tenure.

(F) "Due Process" Does Not Require a "Judicial Hearing" on Loss of Any "Rights" in Public Employment

As already shown above—the case of *Bailey* v. *Richardson, Garner* v. *Board of Public Works* and *Washington* v. *McGrath, all supra,* all hold that public employment is not such a right that it must be terminated only by a "hearing", "judicial" or otherwise, in order to satisfy due process.

The same subject is discussed at more length hereinafter under the heading IV (C), Appellants Had No Constitutional Right to "Judicial Hearings" Before Removal.

(G) The Act Does Afford a "Judicial Hearing"

The fact is that, although rights to public employment are not such property rights as are protected by "due process" or require that a "judicial hearing" precede their loss, nevertheless Section 6 of the Hutchinson Act does accord such a hearing.

The consequences of striking which the Act imposes are not "imposed without a judicial trial." The Act's Section 6 (423.206 C. L. 1948) provides that,

> "• • • such person, upon request, shall be entitled, as hereinafter provided, to establish that he did not violate the provisions of this act • • •",

and requires (1) the filing within 10 days of the discharged employee's written request for hearing with the officer having the power of removal, (2) the commencement in ten days of a proceeding to determine whether he violated the Act "in accordance with the law and regulations appropriate to a proceeding to remove such public employee", and (3) a decision within 10 days. It permits the appeal, by petition to the Labor Mediation Board and hearing thereon of any decision unfavorable to the employee. From either hearing an appeal, by certiorari to the courts, remains unaffected by the Act. (*In re Fredericks*, 285 Mich. 262).

The first mentioned administrative hearing is sufficiently "judicial" to comply with the Constitution. *U. S.* v. *Reimer* (D. C. N. Y.) 22 Fed. Supp. 573; *People* v. *Camperlingo*, 69 Cal. App. 466, 231 Pac. 601. See also: *People* v. *Chapman*, 301 Mich. 584, 600-604. Being "in accordance with the law and regulations appropriate to a proceeding to remove such employee", it could not be more "judicial" and yet be constitutional. The Michigan Constitution forbids the judiciary to exercise administrative powers; and prevents the Legislature from authorizing or requiring the judiciary to conduct such hearings or to review them de novo (Art.

IV); *In Re Fredericks,* 285 Mich. 262, 267; *Goodfellow* v. *Detroit,* 312 Mich. 226, 231-232.

Just as the legislation seeking to provide for the continuance of functioning of government by keeping out of it employees who are disloyal and advocate the forcible overthrow of government was held valid in the above cases, so the Hutchinson Act, seeking to provide for the continuous functioning of the various branches of government by preventing interruptions thereof by strikes, is valid. The justifiable purpose of the legislation is not retrospectively punitive. It violates no constitutional or common law right of a public employee to strike and still retain his job; but, as a proper regulation of public employment, it is justifiable under the United States Supreme Court's recent decision in the case of *Garner* v. *Board of Public Works, supra,* 95 L. Ed. 1317, and the other above decisions which hold that such legislation does not violate "due process".

Appellants' claim that the Hutchinson Act violates due process is so completely without merit that it does not raise a substantial Federal question.

III

Appellants' Claim That the Hutchinson Act Denies Equal Protection of the Laws, Raises No Substantial Federal Constitutional Question.

Under the powers granted to cities by the Michigan Constitution's Article VIII, Section 23, and by the Michigan Home Rule Act (279 P. A. 1909, Sections 117.1-117.38 C. L. 1948) in its Sections 4d and 4f (Section 117.4d and 4f, C. L. 1948), and under the Detroit Charter's requirement (Title IV, Chapter XIII, Section 1) that: "The city shall at once * * * acquire * * * own and operate * * *" a trans-

portation system—in the instant matter the Michigan Supreme Court correctly found that:

> "'* * * the person's engaged in operating Detroit's street railway system are employees of the City of Detroit and, hence, are 'public employees.'"

The general, fundamental differences in treatment accorded by legislation to privately owned and publicly owned utilities has been approved by the United States Supreme Court in the case of *Springfield Gas and Electric Company* v. *City of Springfield*, 257 U. S. 66, 42 S. Ct. 24, 66 L. Ed. 131, wherein claim was made that such a distinction violated the constitutional prohibition relative to equal protection. Justice Holmes, answering that claim, said:

> "'The plaintiff's argument, shortly stated, is that, in selling electricity, the city stands like any other party engaged in a commercial enterprise. * * * But, we agree with the Supreme Court of the State that the difference between the two types of corporation warrants the different treatment they have received.'
>
> 'The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim. * * *.'" (257 U. S. 69, 42 S. Ct. 25, 66 L. Ed. 133).

In *Wolgamood* v. *Constantine*, 302 Mich. 384, the Court said:

> "We have recognized that a municipality's operation of a public utility, although it may be a proprietary activity, constitutes engaging in a public enterprise for a public purpose." (302 Mich. 394-395).

In labor legislation, this distinction between (a) those public employees working in publicly-owned utilities and (b) private employees working in privately-owned utilities, is frequently drawn and is sustained in the courts.

In *Creekmore* v. *Pub. Belt R. R. Comm. of New Orleans*, 134 Fed. 2d 576, cert. den. 320 U. S. 742, 88 L. Ed. 440, 64 S. Ct. 43, the Court held that the Fair Labor Standards Act (29 U. S. C. A. Sec. 201-219) did not apply to employees of a belt railroad owned and operated by the City of New Orleans. The Court called the exclusion—i. e., "any State or political subdivision of a State" from the definition of employer—"plain and unambiguous language and should be given effect as it is written" (134 Fed. 2d 577.) The claim that, since the City was acting in a purely proprietary capacity its employees should be within the Act, was denied, the Court saying:

> "In construing the Act the duty of the Court is to determine what employers and employees are within its coverage, not what employees 'should' have been covered, for the question of who 'should' be covered is a matter solely within the province of the legislative branch of the government. The language of Section 3(d) being plain, its meaning clear, the result reasonable, we see no reason for resorting to extraneous considerations in an effort to construe and give to such language another and different meaning.'
>
> • • • • • • •
>
> "The City of New Orleans being a political subdivision of the State of Louisiana, and the Public Belt Railroad Commission being one of its duly authorized, functioning departments, we think it clear that the employer-employee relationship between these employees and the City and its Commission falls squarely within the language of section 3(d) which in defining 'employer' excludes 'any State or political subdivision of a State.' " (134 Fed. 2d 577-578).

In *Abad* v. *Puerto Rico Com. Auth.*, 88 Fed. Supp. 34, the Court held that the terms of the Fair Labor Standards Act excluded from the Act's operation an Authority created to operate telephone and telegraph lines owned by the Puerto Rico Insular Government.

In *Wood* v. *Detroit*, 188 Mich. 547, the Court sustained, as not denying equal protection of the laws, a Workmen's Compensation Act which was compulsory upon cities and their employees, including the publicly-owned proprietary utilities of cities and the city employees engaged therein; although the Act gave to private utility corporations and their employees a right to elect to come under the Act or not.

In *Bross* v. *City of Detroit*, 262 Mich. 447, the Court held that a city fireman injured on duty while driving a fire truck which collided with a city-owned street car, could not sue the City at Common law as being "some person other than the employer" within the meaning of the Workmen's Compensation Act, which Act forbade any employee under the Act to sue his employer and restricted this employee's remedy against the employer to workmen's compensation.

Springfield v. *Closs*, 356 Mo. 1239, 206 S. W. 2d 539, holds that a law regulating labor relations of private employers' employees does not extend to employees of a city-owned bus line.

In the field of State legislation on labor relations this distinction is also justified by the courts for the reason (*inter alia*) that above mentioned Federal Labor legislation itself makes the distinction.

In *Nutter* v. *Santa Monica*, 74 Cal. App. 292, 168 Pac. 2d 741, the Court, denying to employees of Santa Monica's city-owned bus system the statutory right of collective bargaining given to employees of private employers, said:

> "The principle espoused by Section 923 is essentially the same as that fostered by the National Labor Rela-

> tions Act, 29 U. S. C. A. § 151 et seq., namely, the right of workmen to enjoy free collective bargaining over terms and conditions of employment. In adopting that act Congress did not recognize the existence of the right of collective bargaining in public employment and did not consider it necessary to adopt a national policy which would extend into the field of public employment. Section 2(2) of the act expressly excepts from the definition of the term 'employer' the United States and any state or political subdivision thereof.' " (74 Cal. App. 2d 298, 168 Pac. 2d 745).

The Federal labor laws distinguish between employees of privately-owned and employees of municipally-owned utilities (as in the Fair Labor Standards and Taft-Hartley Acts) in excluding from these laws municipally-owned utilities and their employees when excluding "the State or any political subdivision thereof" (*Creekmore* v. *Public Belt Railroad Commission of New Orleans*, and *Abad* v. *Puerto Rico Communications Authority, both supra*). In *Consolidated Edison Company* v. *Labor Board*, 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206, and *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 95 L. Ed. 364, 71 S. Ct. 359, the courts interpreted the Federal Law as being that the United States had legally and constitutionally occupied the field of labor relations of privately-owned utilities and excluded the States therefrom. The Federal courts, having sustained this distinction in the *Creekmore* and *Abad* cases, *supra*, the field of labor relations of privately-owned utilities is thus beyond State control and the field of municipally-owned utilities is thereby left to State control.

This distinction drawn by Congress and sustained by the United States Supreme Court, justifies state legislation which controls the labor relations of municipally-owned utilities but does not control those of privately-owned utilities. Such state control, when exercised by the Michigan

Legislature as in the Hutchinson Act, is constitutional and the Hutchinson Act does not thereby violate the Federal constitutional guarantee of equal protection of the laws.

The case of *Alabama St. Fed. of Labor* v. *McAdory*, 65 S. Ct. 1384, 325 U. S. 450, 89 L. Ed. 1725, is directly in point. There a claim that an Alabama statute regulating labor unions denied equal protection of the laws, was rejected. The Court said:

> "The contention that the Act denies equal protection because its provisions, or some of them, have not been extended to business corporations or associations or to labor organizations which are subject to the Railway Labor Act, 45 USCA § 151 et seq., 10 A FCA title 45, §§ 151 et seq. is without substance. The Constitution does not obligate a state to regulate or reform all types of associations and organizations, or none. It may begin with such as in its judgment most need regulation. Carroll v. Greenwish Ins. Co., 199 U. S. 401, 411, 50 L. Ed. 246, 250, 26 S. Ct. 66; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. Ed. 1288, 1289, 34 S. Ct. 856; Bunting v. Oregon, 243 U. S. 426, 61 L. Ed. 830, 37 S. Ct. 435, Ann. Cas. 1919 A 1043; Sproles v. Binford, 286 U. S. 374, 396, 76 L. Ed. 1167, 1183, 52 S. Ct. 581, cf. West Coast Hotel Co. v. Parrish, 300 U. S. 379, 400, 81 L. Ed. 703, 713, 57 S. Ct. 578, 108 ALR 1330, and cases cited. And for this reason it may exclude from regulatory measures organizations which it has reason to believe are already appropriately regulated by either state or national legislation. Ziffrin, Inc. v. Reeves, 308 U. S. 132, 140, 84 L. Ed. 128, 136, 60 S. Ct. 163; cf. Union Bank & T. Co. v. Phelps, 288 U. S. 181, 188, 77 L. Ed. 687, 689, 53 S. Ct. 321, 83 ALR 1438.
>
> We would not have granted certiorari to review so unsubstantial a question, and all the other issues, as presented by the record now before us, are, for reasons which we have given, inappropriate for decision in a declaratory judgment proceeding. The writ of certiorari will therefore be dismissed." (89 L. Ed. 1740-1741, 325 U. S. 471-472, 65 S. Ct. 1394-1395).

Appellants' contention here, that the Hutchinson Act denies equal protection because it regulates the labor relations of publicly-owned utilities' employees but not those of employees of private utilities, is practically identical with the contention that the Alabama labor relations act denied equal protection because its provisions applicable to some labor unions "have not been extended to business corporations, associations or to labor organizations which are subject to the Railway Labor Act"—a contention which the United States Supreme Court said in that case was "without substance" and "unsubstantial". Just as the Court there said:

> "The Constitution does not oblige a state to regulate or reform all types of associaitons or organizations, or none. It may begin with such as in its judgment most need regulation."
>
> "And for this reason it may exclude from regulatory measures organizations which it has reason to believe are already appropriately regulated by either State or national legislation."

So here too the Constitution does not oblige Michigan "to regulate or reform all types of associations or employees or organizations in their labor relations, or none" and Michigan also "may begin with such as in its judgment most need regulation" and "may exclude from the regulatory measures" employees of privately-owned utilities, as being those "which it has reason to believe are already appropriately regulated by * * * national legislation", the Taft-Hartley Act.

What the United States Supreme Court has said of the claim of denial of equal protection in the *Alabama* case, *supra*, applies with even greater force to the similar claim advanced in the instant case, *i. e.*, it is "without substance" and "so insubstantial a question" as to not merit the granting of appeal.

IV

Appellants' Claim That the Hutchinson Act Is a Bill of Attainder Raises No Substantial Federal Constitutional Question.

(A) The Cases Cited by Appellants Are Not in Point Here

Appellants apply to the Hutchinson Act the epithet, Bill of Attainder, without citation of any pertinent judicial precedent so condemning any similar legislation. This is mere name calling.

Appellants cite 13 cases, all of which discuss, as bills of attainder, legislation utterly unlike the Hutchinson Act.

Thus 8 of their cited cases are "test oath" cases, which condemn legislation adopted after the Civil War solely to punish *retrospectively* persons suspected of previous acts of disloyalty to the Union, *acts committed before or during the Civil War and before the enactment of the legislation*—the legislative device being to require of such suspected citizens an oath of *prior* loyalty to the Union as a condition precedent to the exercise of various civil rights.

Of such "test oath" cases, and of *United States* v. *Lovett*, 66 S. Ct. 1073, 328 U. S. 303, 90 L. Ed. 1252 (also cited by Appellants in the instant case)—the United States Supreme Court said in *Garner* v. *Board of Public Works*, 95 L. Ed. 1317, 71 S. Ct. 909, 341 U. S. 716:

> "Bills of attainder are 'legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . .' United States v. Lovett, 328 U. S. 303, 315, 90 L. Ed. 1252, 1259, 66 S. Ct. 1073 (1946). Punishment is a prerequisite. See concurring opinion in United States v. Lovett, supra (328 U. S. at 318, 324, 90 L. Ed. 1261, 1264, 66 S. Ct. 1073). Whether legislative action cur-

tailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.' Cummings v. Missouri (U. S.), 4 Wall. 277, 320, 18 L. Ed. 356, 362 (1867). We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.

Cummings v. Missouri (U. S.), 4 Wall. 277, 18 L. Ed. 356 (1867), and Ex Parte Garland (U. S.), 4 Wall. 333, 18 L. Ed. 366 (1867), the leading cases in this Court applying the federal constitutional prohibitions against bills of attainder, recognized that the guarantees against such legislation were not intended to preclude legislative definition of standards of qualification for public or professional employment. Carefully distinguishing an instance of legislative 'infliction of punishment' from the exercise of 'the power of Congress to prescribe qualifications,' the Court said in Garland's case: 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' (U. S.), 4 Wall. at 379, 380. See also Cummings v. Missouri, supra (U. S.), 4 Wall. at 318, 319, 18 L. Ed. 361, 362). This doctrine was reaffirmed in Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 S. Ct. 231 (1889), in which Mr. Justice Field, who had written the Cummings and Garland opinions, wrote for a unanimous Court upholding a statute elevating standards of qualification to practice medicine. And in Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002, 18 S. Ct. 573 (1898), the Court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony. Both Dent and Hawker distinguished the Cummings and Garland Cases as inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it." (341 U. S. 722-723, 95 L. Ed. 1323-1324, 71 S. Ct. 913-914).

Three remaining cases cited by Appellants also discuss attainder legislation utterly unlike the Hutchinson Act. *In re Yung Sing Hee*, 36 Fed. 437, 13 Sawy. 482, merely holds that a statute, which because of his race bars a citizens' re-entry into the country, is a bill of attainder—the *"punishment" being for the past "offense"* of having been born a Chinese *and not for something he may do in the future. McNealy* v. *Gregory*, 13 Fla. 417, holds only that the then Florida Constitution's voiding of all evidences of debts based on *previous* sales or purchases of slaves, *would be* a bill of attainder if its purpose were to punish the making, *prior to the enactment*, of such property the subject of sale. *Davis* v. *Berry*, 216 Fed. 413, holds that a statute requiring that criminals twice convicted of a felony undergo the operation of vasectomy, works the cruel and unusual punishment, violates the due process and, *in its inflicting of punishment for past offenses* by a legislative act without jury trial, is a bill of attainder.

In the last of these 13 cases cited by Appellants, *Gaines* v. *Buford*, 1 Dana. 481, 31 Ky. 313, the compact by which Kentucky became a State (contained in a Virginia statute and the Kentucky Constitution and approved by Congress) provided that "all rights and interests in lands" in Kentucky "shall remain valid and secure" and subsequent Kentucky legislation attempting to grant to good-faith occupants of Kentucky lands reimbursement for improvements if evicted by better title, had been held invalid as impairing the compact's obligations of contract. (*Green* v. *Biddle*, 21 U. S. 1, 8 Wheat. 1, 5 L. Ed. 547). Then a second Kentucky statute of the same sort, whose stated purpose was to counteract the United States Supreme Court's decision in the *Green* case, was passed. This second statute was declared unconstitutional in the *Gaines* case by only two Judges' opinions.

Judge Underwood held that the statute was unconstitutional as impairing the compact's obligations of contract but not as a bill of attainder. Judge Nicholas said that the statute "would seem to fall under this inhibition (bill of attainder) but then said:

> *"It is unnecessary to say whether either of the several clauses of the constitution referred to, would, singly, be sufficient to invalidate the act; and I do not wish, therefore, to be understood as saying that either of them would.* But that some, or all of them together, do invalidate it, I feel no doubt. They all tend to show that the legislature cannot in this mode, by any mere act of its own, divest a citizen of his property. They constitute together, in letter, spirit, and general scope of policy, a mass of obstacle to the divestiture of Gaines' title, in the manner contemplated, which to my mind is perfectly insurmountable, and which compels me to concur in saying the title is still in him, and that the act of 1824 is no obstruction to his recovery." (31 Ky. 332).

Such legislation has no similarity whatsoever to the Hutchinson Act, a statute *which does not operate retrospectively at all. It only operates prospectively and forbids public employees to strike in the future.* It makes such future striking a termination of employment, seniority rights and pension rights, subject to (1) the striker's right to a hearing on whether or not he struck and thereby possible reinstatement and (2) even if he is found to have struck, his possible re-employment, which can be at no more than his pre-strike pay for the next year and must be without tenure for two years. The Act cannot possibly operate upon any public employee except prospectively and then it does not operate unless and until he strikes. This is a far cry from "test oath" legislation, which *retrospectively* and without provision for hearing, convicts and punishes those of a class who are merely suspected of having, prior to the

enactment, committed the acts to be punished. The decisions condemning such legislation as attainder are (even as the United States Supreme Court said above): "inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it", and hence even less applicable where the disqualification is only on a future contingency and only for acts which the employee himself may choose to commit in the future.

(B) The Act Inflicts No "Punishment"

As already shown, appellant public employees have no constitutional property rights to public jobs. What rights they have to their employment and any appurtenant "rights" are subject to regulation, fixing qualifications for getting and holding public jobs, even though such regulations may terminate the employment and appurtenant rights. And although such termination need not be by "judicial hearing", the Hutchinson Act does afford such hearing.

Primarily the relationships between a State and its employees, including the legal responsibility, conditions and rights arising out of such public employment, are matters of State, rather than Federal, policy and control—to be determined by the State's common law decisions, and the State's statutes, so long as such law does not conflict with the Federal Constitution.

The Federal Constitution does not purport to grant to any State employee any right to retain his public employment while he is striking. Such "rights" could come only from the State's statute or common law, the interpretations of which by the State's highest tribunal are binding on the United States Supreme Court.

On this subject, the Michigan Supreme Court's decision here appealed from has interpreted the pertinent common law and the pertinent statute, in saying:

> "The Hutchinson Act provides certain limitations and regulations, but it 'inflicts' no punishment. It does not provide for fines or imprisonment, nor does it deprive a public employee, who has taken part in the strike, of any vested right.
>
> We know of no constitutional provision which gives an individual the right to be employed in governmental service or to continue therein." (332 Mich. 247).

The United States Supreme Court's recognition of the finality of a state's Supreme Court's interpretation of that state's common law and statutory law on a matter of so purely state, and not Federal, jurisdiction as is involved in the instant case, would accord with the Federal policy exemplified in Congress' exempting of "and state or political subdivision thereof" from the operation of such Federal labor legislation as the Fair Labor Standards Act and the Taft-Hartley Act. Thus Congress, by the Taft-Hartley Act, forbids private utility employers to fire an employee for striking; but Congress, in exempting entirely from this Act "any state or political subdivision thereof", leaves to each state the control over the responsibilites, conditions and rights of public employment, including employment in city-owned utilities.

Such recognition by the United States Supreme Court would also accord with the United States Constitution as interpreted by this Court in *Garner* v. *Los Angeles, supra,* wherein the Court held that the City of Los Angeles' charter amendment and the ordinance requiring loyalty oaths was not a bill of attainder, saying:

> "We assume that under the Federal Constitution the Charter amendment is valid to the extent that it bars from the city's public service persons who, subse-

quent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. Gerende v. Board of Supervisors of Elections, 341 U. S. 56, ante, 745, 71 S. Ct. 565 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, United Public Workers v. Mitchell, 330 U. S. 75, 102, 103, 91 L. Ed. 754, 774, 775, 67 S. Ct. 556 (1947), and a State is not without power to do as much." (95 L. Ed. 1323, 71 S. Ct. 913, 341 U. S. 720-721).

The very fact that under the Federal Constitution states and cities can regulate reasonably public employment negatives any claim that the state or city employee has a Federal constitutional right to violate such regulation and can, contrary to such regulation, get or retain a public job. It especially negatives any claim to a Federal constitutional right to hold a public job until removed by "judicial hearing".

While many states, by civil service or veterans' preference legislation, give their public employees certain rights of tenure, no provision of the Federal Constitution requires that any State enact such legislation at all, nor that it enact such legislation with provision for "judicial hearings" restricting removals to those affected by such hearings. Nor does the Federal Constitution require that any public employee, if discharged, be given any re-employment at all, much less that he be given re-employment on his own terms.

The Federal Constitution leaves the matter of such regulations entirely to the states—so that state legislation on them, like the Hutchinson Act, does not thereby impose such punishment, either criminal or by deprivation of "rights", as to constitute attainder.

(C) Appellants Had No Constitutional Right to "Judicial Hearings" Before Removal

Nor does such legislation deprive any employee of any Federal constitutional right to a "judicial hearing".

The *Garner* case, *supra*, holds that public employment is not an absolute right; that it is a privilege which can be regulated by statute so that the employee's violation of such statutory regulation may itself, without judicial hearing, terminate his employment; and that if such violation of regulation without previous judicial hearing terminate employment—the regulation is not thereby a bill of attainder. In this the *Garner* case merely conforms to the general rule that, where a statute which regulates the exercise of a privilege requires that violation itself of such regulation terminate the privilege, the statutory requiring of termination does not make the statute unconstitutional.

To the same effect are the cases of *Bailey* v. *Richardson* and *Washington* v. *McGrath*, both *supra*.

This rule has been followed by our Michigan Supreme Court. *Johnson* v. *Commr. of Agriculture*, 314 Mich. 548, reviews at length the decisions sustaining licensing laws which provide for revocation of license upon violation of the regulating law. The only real difference between the *Johnson* case and the one at bar in this respect is in the order of procedure. In the *Johnson* case, the Commissioner of Agriculture *himself institutes the hearing before himself* on the revocation of the privilege; while under the Hutchinson Act, the public officials must first make an *ex parte* finding that the employee has struck and then the

employee can institute steps leading to two hearings, the first before these public officials, the second before the Mediation Board, and, if desired, finally certiorari appeals from these hearings to the Courts.

The statutory grant to a board of registration in medicine of the power to decide whether an applicant for registration had been legally registered under a prior statute, without provision in terms for a review of such board's decision, does not render the act obnoxious to the Federal Constitution as being without due process, as long as the action complained of may be reviewed by the courts. *Reetz* v. *Michigan, supra,* 23 S. Ct. 390, 188 U. S. 505, 47 L. Ed. 563.

(D) The Hutchinson Act Affords A "Judicial Hearing"

Although at common law, a public employee who struck had no right to a "judicial hearing" before discharge, or after it, the fact is that the Act itself in Section 6, *does* afford each employee a hearing which is as "judicial" as the Michigan Constitution's Article IV (prohibiting the judiciary to exercise executive or administrative powers), permits, as the Michigan Supreme Court said in the Opinion here appealed from:

> "A basic reason urged by cross-appellants in challenging the constitutionality of the Hutchinson Act is that it contains no provision for judicial review of rights asserted by a discharged public employee, and hence they are deprived of due process of law. However, by section 6 of the act provision is made for such an employee to have a hearing before the officer or body having power to remove such employee, and for a right of review of a holding adverse to such employee before the labor mediation board. We have held that like provisions are quasi-judicial and afford to the discharged employee compliance with his constitu-

tional rights. In *In re Fredericks,* 285 Mich. 262, a headnote reads:

> 'A decision of a municipal civil service commission upon a hearing to remove an employee of a fire department for cause, not being the result of judicial action, but being at most a quasi-judicial act of an administrative tribunal, is not subject to review by the courts on appeal and an attempt by the legislature to create a right of appeal would be unconstitutional as an endeavor to foist nonjudicial functions upon the courts.'" (332 Mich. 246).

The fact that such hearing follows, rather than precedes, discharge does not invalidate the Act. This is the usual order in which, under tenure statutes, all separations from public service take place; first discharge, then application for hearing, then hearing and then decision on the hearing. The Federal Constitution does not condemn this order or require any different order.

There is no Federal constitutional requirement that such hearing be by persons who have had utterly no connection with the original discharge. The Michigan Legislature was not legally bound to presume that the public officials who had supervised the public employee before he struck would be partial. It could lawfully provide that the hearing on discharge be held by those officials who probably were most familiar with the basic facts of the strike.

The fact that on the second hearing provided the Labor Mediation Board can only effect a voluntary settlement, rather than make a final binding decision, does not void the Act. This hearing is just an additional protection to the employee discharged for striking. The Federal Constitution requires no such additional hearing at all nor does it require that it be before a board having final authority in the matter.

From the decision on either such hearing or both the right of appeal to the courts by certiorari still exists and is not barred, limited or affected by the Hutchinson Act. *In re Fredericks*, 285 Mich. 682.

The Hutchinson Act is even less open to attack as a bill of attainder than was the legislation which the United States Supreme Court sustained as not a bill of attainder in the *Garner* case, *supra*. There is one distinction: In the *Garner* case the employee, in order to remain on the job, was required to take some positive action (oath); but under the Hutchinson Act the employee, to remain on the job, is not required to take any positive action at all, he remains on the job until he himself takes the positive action of striking. In this respect the Hutchinson Act is even less "automatic", even less self-executing, and therefore even less open to condemnation as a bill of attainder, than that sustained in the *Garner* case, as not being a bill of attainder.

The Hutchinson Act is so obviously not a bill of attainder that the contrary claim is utterly without substance.

V

Conclusion

We respectfully submit that none of Appellants' three claims of unconstitutionality of the Hutchinson Act raises a substantial Federal constitutional question, and that all three are so unsubstantial that Appellee's Motion to Dismiss or Affirm should be granted.

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Office - Supreme Court, U. S.
FILED
JUL 17 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER 1951 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26, GEORGE KNOPPE, THOMAS WOOF, JOHN B. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as Board Members of said Division 26, JOHN DOE and RICHARD ROE, whose persons are well known, but whose names are unknown,

Defendants-Appellants,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MORKLE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees,

and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS INVOLVED

1. Is there a substantial question under the due process of law clause of the 14th Amendment?

2. Is there a substantial question under the equal protection of the laws clause of the 14th Amendment?

3. Is there a substantial question under Constitution, Article I, Section 10, proscribing bills of attainder?

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Intervening Defendants-Appellees

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

I.

STATEMENT OF FACTS

Appellees have filed a statement opposing jurisdiction, and a motion to dismiss or affirm. This is our reply, under Rules 7(3) and 12(3).

II.

ISSUES

The issues presented are whether or not there are substantial questions under the three constitutional provisions invoked (1) the due process of law clause of the 14th Amendment, (2) the equal protection of the laws clause of the same Amendment and (3) Art. 1, Sec. 10 proscribing Bills of Attainder.

III.

PRELIMINARY STATEMENT

It seems to us better to present an analysis of the State Statute in question, rather than to reply in a necessarily somewhat disconnected manner to appellees' statement, point for point.

It seems to us that the application of the three constitutional objections to the State Statute raised in this appeal becomes apparent when there is an understanding of the significance of the challenged statute in relation to the situation to which it was applied in this case.

IV.

ANALYSIS OF THE HUTCHINSON ACT

The Hutchinson Act in section 2 *prohibits strikes* by public employees, as the Act describes public employees.

The Act takes no effect at all, and is wholly dormant until a strike occurs. Its operation on any individual employee is wholly dependent upon the existence of the one single fact, namely that he engaged in a strike, as that term is defined in sections 1 and 6.

It is of primary significance that no provision is made in the act for any *finding* of the existence of this pivotal fact. No method for its determination is outlined or even hinted in the Act. It is left entirely to assumption, and whose assumption is not clear—but in the present case, the municipality through the Board of Commissioners of the Street Railway system, assumed the authority, and having assumed to make such "finding", applied the Act (R. 74-75, 387-395).

It seems to us at once apparent that this "finding" was nothing more than taking cognizance by the city of the fact that a strike occurred. Actually the "finding" of the board went so far as to apply to individual employees, and exclude others (R. 74-75, 398-401). It was in no sense such finding as could bind the individual employee, nor is it a finding required to be made by any provision in the Act, but is wholly and completely something which the municipal authorities assumed to take upon themselves to do.

The effects of the Act on the individual employee (Sec. 4) is contingent upon the fact that he "violates"—that is to say, he engaged in a strike, as that term is defined in the Act. The Board of Commissioners then, by their "finding", without hearing, without notice, and being composed of persons who were adversary to the employees in the labor controversy, arbitrarily made individual employees amenable to the law, "notwithstanding the provisions of any other law", and excluded others.

It is a significant fact that the Commission did not apply their "finding" to a very considerable number of the employees (R. 74-75, 398-401).

Under the same section 4, the employee when he "violates the provisions of this act shall *thereby* abandon and

terminate his appointment or employment", and various other penalties follow.

This provision is vastly different from any other legislative act which has come to our attention, as providing for the discharge of public employees. Any such law that we have seen *does not operate directly* on the employee in such manner that he "thereby" loses his job and incurs penalties for doing a prohibited act, but rather these provisions merely make the designated misdeeds ground for his discharge by his employer—such as does the Hatch Act. See *United Public Workers v. Mitchell,* 330 U. S. 75, 67 S. Ct. 556, 91 Law Ed. 754. And so were the Ordinance and Charter provisions in Los Angeles having to do with non-Communist affidavits. See *Garner v. Board of Public Works,* 341 U. S. 716, 71 S. Ct. 909; 95 Law Ed. 1317. The same distinction appears in *Bailey v. Richardson,* 182 Fed. (2) 46—all of these cases having been cited by appellees.

This is a substantial difference, for most cities have an established procedure providing for a hearing, judicial in nature, before an employee may be finally discharged, and subsequent recourse to the courts to review the same—as does the city of Detroit, and to the benefits of which these employees were entitled under the Civil Service provisions of the Charter.

But even without reference to any such provisions, the Hutchinson Act is shockingly arbitrary, for not only does it compel job severance "notwithstanding any other provision of law" by direct operation *but it inflicts additional penalties,* to which consideration we shall shortly come.

When the employee strikes there is "thereby" a complete job severance. He is no longer an employee of the city.

In addition to the sufficient language of section 4 above quoted, section 5 makes this doubly clear by saying that he may "subsequent to such violation be *appointed or re-appointed, employed or re-employed.*" It does not say that he may be "reinstated" but conclusively implies that he is no longer an employee. This is well understood, for counsel for the city bitterly contested use of the word "reinstate" in the decree of the trial court (R. 373-378).

When he is alleged to have struck therefore, there are two courses open to the individual employee (except of course that he may abandon the whole thing and go elsewhere, which in no wise lessens the impact of the Act upon him);

First, under Section 5, he may apply to the city for a job. If he gets it, under that section his "compensation" (which includes fringe benefits for the word "wages" is not used) "shall in no event exceed that received by him immediately prior to the time of such violation", and it "shall not be increased until after the expiration of one year", and for two years he shall be on "probation" "without tenure" "at the *pleasure* of the appointing officer or body."

Thus, immediately upon the assumed participation in a strike by the individual employee—which fact is in no competent way established—the employee is placed in a class separate from all others, in that he cannot offer his services in the one place most natural for him to offer them, on a footing equal to all others.

In *Raney v. County Commissioners,* 170 Md. 183, 197, 183 A. 548, 554, it is said:

> "While it is true that no particular person has any right to governmental employment, yet all persons have a right to apply on equal terms for such employment, and when terms are prescribed as con-

ditions precedent to such employment, they must be reasonable, and have some relation to qualification for the service."

Raney v. County Commissioners, 170, Maryland 183, 197, 183 At. 548, 554.

In *Cummings v. Missouri,* 4 Wall. 277, 321-2, 18 Law Ed. 356, 362, it is said:

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among those are life, liberty and the pursuit of happiness; and that *in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone,* and that in the protection of all these rights, *all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no otherwise defined."* (Italics ours.)

Cummings v. Missouri, 4 Wall. 277, 18 Law Ed. 362.

A substantial right is thus violated by the Hutchinson Act immediately when a strike is asserted, though not found to exist in any competent manner. The employee is immediately placed in a class different from all his fellows, and subjected to burdens and penalties.

We submit that this is a substantial right protected by both the equal protection of the laws clause, and the due process of laws clause of the Fourteenth Amendment.

Second, the employee who has asserted to have struck may go with his hat in his hand to his *employer,* to his adversary in the labor controversy, and *there* seek to "establish that he did not violate the provisions of the Act", under Section 6.

One needs but to project his presence to such scene to be convinced of its conclusive partiality in the light of the events of this controversy. We have in our jurisdictional statement pointed out that this hearing is not judicial in character because of a lack of impartiality of the tribunal.

Besides, there is no reason why this burden should be placed on any individual employee. Why is any individual employee obliged to undertake the burden of proving that he did not violate the act? *There is nothing to establish that he did so.* It is only *assumed* that he did so. But the burden is placed on him by Section 6, "notwithstanding the provisions of any other law."

In other words, under Section 6 he is assumed to be guilty and subject to all the penalties of the Act, and is forced, before a partial tribunal, to free himself of the presumption.

He is, under the terms of the Act, subjected to the burdens of overcoming what the Act treats as an *adjudication* —though there is no shadow of such in reality—that he has violated the Act.

It adds nothing that he may, under the statute, obtain a review by the State Mediation Board, where he is subject to the same burdens.

Essentially, there is nothing in existence to place the burden upon him.

It is important in this regard to keep in mind that his job is not all that is at stake. There are other issues. He must free himself from the imposition of penalties—from being placed in a class where he cannot sell his services to his former employer on a footing equal to that of others.

This burden cannot be foisted upon him without a competent adjudication of guilt.

This Act is frankly penal in nature. Its operation effects much more than mere job severance. Immediately upon the assumption by the Municipality that an employee has violated the act, the city is bound by the Act to treat him as a violator, and hence the employee is immediately subject to the penalties. He is not only out of a job, but he is placed within a proscribed class who cannot sell their services again to the city on equal terms with others (Sec. 6) without first sustaining the burden of lifting the presumption of guilt in the non-judicial proceedings provided in Section 5.

It seems to us that the Act is analogous to a criminal statute. For example, the murder statute in Michigan (C. L. 29, Sec. 16708, M. S. A. 25.548) provides that First Degree Murder "shall be punished by solitary confinement at hard labor in the state prison for life". If under this statute, the law enforcement officers take cognizance of a murder (making a "finding"), and proceed to execute the terms of the punishment provided in the statute, without judicial hearing or any other proceeding, judicial in nature, we have an exact analogy to the proceedings actually had in this case under the Act, *and required by the Act.* The distinctions are only in degree, not in kind.

Appellees' argument that the striking employees "discharge themselves" is but a sophistry. Under this reasoning in the above analogy, appellees would say that the alleged culprit confined himself in the state prison for life.

Nor is the act one merely providing qualifications for holding or obtaining public employment, nor regulatory thereof. It is rather one making the act of striking a penal offense, and punishing the same without any shadow of due process of law, but solely on the assumption of the municipal authorities that the particular public employee is guilty.

In *Cummings v. Missouri*, 4 Wall. 277, 319; 18 Law Ed. 356, 361-2, this court said:

> "Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean 'any natural endowment or any acquirement which fits a person for a place, office or employment, or enables him to sustain any character, with success.' It is evident from the nature of the pursuits, and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and profession." • • •
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> "It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the existence of the profession and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings, or the trusts with which they were charged. It was required in order to reach the person not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the calling, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen."
>
> *Cummings v. Missouri*, 4 Wall. 277 (319),18 Law Ed. 356, (361-2).

And the arguments of appellees that the Act provides no "penalties" is a mere shutting of their eyes. The Legis-

lature that adopted the Act believed that they were providing "penalties", and "disciplinary action", and plainly used the terms in the Act, *and provided them.*

With this analysis of the Act as related to the facts presented, we think the application of the three constitutional provisions invoked becomes apparent.

We shall discuss each briefly.

A. THERE IS A SUBSTANTIAL QUESTION UNDER THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT.

The position of appellees that no public employee has a right to public employment—no "property"—is of no consequence in the light of the above analysis.

It is apparent that a public employee, or anyone else, has a right, unless competently adjudged guilty of some offense for which such penalty has been lawfully imposed, to apply for or retain public employment on a footing equal to all of his fellows.

This right is denied by the Hutchinson Act on the mere assumption (in this case) of his employer that he participated in a strike.

Whether this is "property" or "liberty" is of no significance. It is a substantial right, and we think one protected by the due process of law clause.

True, the employee can avoid the penalties under the provisions of Sec. 5 if he can establish before his employer, in a wholly partial proceeding that he did not violate the act.

But this means that he can avoid one burden placed upon him by the act only by assuming another.

So a burden is placed upon him irrevocably by the Act, based on a mere assumption.

And in any event, without any charge brought, and without hearing or determination, he is immediately and arbitrarily subjected to penalties by the terms of the Act, upon the mere assumption that he has engaged in a strike.

We think the due process of law clause clearly applies.

B. THERE IS A SUBSTANTIAL QUESTION UNDER THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FOURTEENTH AMENDMENT.

1. In our jurisdictional statement we urge that there is no sufficient distinction between employees of a municipally operated transportation system, and a privately operated one, to justify placing the former in a separate class, and imposing burdens upon them by legislative act, to which the others are not subjected.

We therein cite a considerable number of authorities to the effect that municipally owned proprietary enterprises must be governed by the same rules applicable to those owned privately.

Appellees in their statement cite decisions that they claim hold otherwise.

If this is true, the direct diversity among the decisions would seem to indicate a substantial question.

We think the truth is that no decision holds, and we think none could hold either that the distinction is sound for all purposes, or that it is not sound any for any purpose at all.

We think that the true rule is that it is sound for some purposes, but not for others.

Our own situation must be examined and analyzed to determine the question.

This makes it a substantial question.

We wish to point out two things having a direct bearing on this question:

First, the Detroit Public Transportation System is by charter provision intensely proprietary, and as remote from the governmental powers of the city as it could be made. See Charter, Title IV, Chapter XIII. The Board or Commission has control, subject to the approval of the Mayor, "as fully and completely as if said board represented private owners". Section 13. The system performs no service to the city as such in any way. No taxpayers' money contributes any part of its income, and its sole income is from passengers' fares—except certain incidental income of a very minor nature, such as from streetcar advertising. The system pays taxes on its property to the municipality. Sec. 4. And while for certain kinds of bonds the city may and has pledged its credit (Section 9-12) the fares are required to be such that "the entire cost of said Street Railway System shall be paid eventually out of the earnings thereof." Sec. 4.

Second, we are here dealing with municipal powers—not the powers of any other unit of government. Municipal corporations have dual powers—governmental and proprietary. This is evidenced by a large number of decisions, but see *Kalamazoo v. Circuit Judge*, 200 Mich. 46 for a fairly full exposition. In contrast, in the Federal Government, in the operation of a business, such powers are incident to some governmental power or function, for that political unit has no proprietary powers separate from governmental powers—such powers being coextensive with government. *U. S. v. Maurice*, 26 Fed. Cas. No. 15747,

2 Brock. 96; *Dikes v. Miller*, 25 Tex. Supp. 281, 78 Am. D. 571. And see *Ashwander v. Tenn. Val. Auth.*, 297 U. S. 288, 56 S. Ct. 466, 80 L. Ed. 688. This difference is important particularly in analysis of the various authorities cited, for the Federal Government exercises nothing but governmental powers, proprietary powers being incident thereto (though of course the federal government does exercise large proprietary powers), while cities exercise proprietary powers which are no part of governmental powers.

We are concerned here with a classification of employees of a city in a strictly proprietary enterprise.

Any analysis must we think begin with these fundamental concepts. Many decisions seemingly applicable, are not so at all.

2. Appellees cite decisions supporting the fairly well understood principle that the constitution does not require the state to embrace everything within a statute that it might reach.

As we understand this rule, it is not necessary to the validity of a state statute that it embrace every class within the law that it might reach, so long as it deals equally with any given class. We quite fully uunderstand that a statute is not invand because it has not gone as far as it might have gone.

But we think equal protection requires equal treatment of all within a class. It is our position that employees of public transportation systems (vehicle operators) are in a natural class, and all must be treated equally; there is no basis for selecting from this natural class merely those employed by municipalities, and that such classification is not germane to the object sought, and rests on no sufficient distinction.

Obviously a strike in a publicly owned and operated utility of a proprietary nature is fraught with no more evil consequences than in a similar public utility privately owned. No governmental activities are interfered with where no governmental activities are involved. A business run by a city, not for municipal purposes, is no different from any other business.

In *Woodward v. Pere Marquette Railway Co.*, 312 Mich. 67, the syllabus says:

> "Statute requiring railroad companies to furnish employees whose duties relate to the immediate transportation of passengers or their baggage with 'a uniform hat, or cap and distinguishing badge' is unconstitutional as class legislation, competing public carriers not being required by any statute to do likewise."
>
> *Woodward v. Pere Marquette Railway*, 312 Mich. 67.

This ruling is very evidently based on the principle that there was no sufficient distinction for segregating the affected employees from the class into which they naturally belonged.

The primary principle of equal protection of the laws is that all members of a class must be treated equally by the law. It is our position that all similar employees of public utilities comprise a class entitled to equality of application of law. If a sub-class is to be carved out of this class, such sub-classification must be upon some reasonable basis.

The Michigan Supreme Court has stated the principle in *Haynes v. Lapeer Circuit Judge*, 201 Mich. 138, (141-142):

"It is elementary that legislation which, in carrying out a public purpose for the common good, is limited by reasonable and justifiable differentiation to a distinct type or class of persons is not for that reason unconstitutional because class legislation, if germane to the object of the enactment and made uniform in its operation upon all persons of the class to which it naturally applies; *but if it fails to include and affect alike all persons of the same class, and extends immunities or privileges to one portion and denies them to others of like kind, by unreasonable or arbitrary sub-classification, it comes within the constitutional prohibition against class legislation.*" (Italics ours.)

Haynes v. Lapeer Circuit Judge, 201 Mich. 138, (141-142).

The distinction between the present case and such decisions as *Alabama State Federation of Labor v. McAdory,* 325 U. S. 450, 65 S. Ct. 1384, 89 Law Ed. 1725, cited by appellees, is clear. In that case complaint was made that the statutory provisions involved "had not been extended to business corporations, associations or labor organizations which are subject to the Railway Labor Act"—(325 U. S. p. 371-2). That is a totally different complaint from the one in our own case. That case stands for the accepted principle that "the constitution does not obligate a state to regulate or reform all types of associations and organizations, or none". That principle in no way impinges upon the principle which we assert, that a state statute must apply equally to all members of a class, and if a sub-class is to be carved out of such class, it must be on some sound distinction.

We think a substantial question is presented on the issue of equal protection of the laws.

C. A SUBSTANTIAL ISSUE IS PRESENTED ON THE QUESTION OF BILL OF ATTAINDER.

1. We think that we have done something more than to merely apply an epithet to the Hutchinson Act. We cite a considerable number of decisions of this court and of other courts, in our jurisdictional statement dealing with bills of attainder. It is quite true, that many of these decisions on the facts are not similar to the case at bar. Many are test oath cases and deal with other factual situations, that most similar to the case at bar being doubtless *U. S. v. Lovett,* 328 U. S. 303, 90 Law Ed. 1252.

In that case, Congress had attached a rider to a deficiency appropriation act, which rider provided in effect that none of the money so appropriated should be used to pay the salaries of Lovett and others, the reason behind it being that congress was in some doubt as to their loyalty. It was provided however that the provisions of the rider would not be effective if within a certain time they were appointed to any position by the President, with proper confirmation. This court held that such constituted a bill of attainder.

The mere fact that no decision presents itself on all fours with the facts would scarcely excuse us from citing decisions of this and other courts dealing with applicable principles.

This we think we did.

Bills of attainder have of course been relatively rare in this country for reasons apparent to anyone who has but rudimentary knowledge of American history. Few indeed occur prior to civil war times, and post civil war times. This period was fruitful of a considerable number of decisions having to do with expurgatory oaths, two most commonly cited being *Cummings v. Missouri,* 4 Wall. 323, 18

Law Ed. 356, and *Ex Parte Garland*, 4 Wall. 333, 18 Law Ed. 366, both decided the same day by this court. The Cummings case is a particularly well considered case, and the principles which it announces are applicable to the case at bar.

The definition of a bill of attainder has been set out in our jurisdictional statement as taken from *Lovett v. United States, supra.* We think the Hutchinson Act falls clearly into this definition.

Certain principles as we say, are clearly established by the decisions which we cite in our jurisdictional statement. Among these are the principles that bills of attainder, in a constitutional sense include both those enactments which were historically such, and also those which provide punishment of lesser degree, and which were called bills of pains and penalties. The principle is also firmly established that it is not necessary that the act designate any particular person, but it is sufficient if it designates a class of ascertained or easily ascertainable persons. It is held also that a bill of attainder need not necessarily be *ex post facto*, but may operate prospectively.

The Michigan Supreme Court contented itself by holding that the Hutchinson Act was not a bill of attainder because it lacked the element of punishment, in that it deprived no one of any "vested" rights, and provided for no fines or imprisonment.

Appellees take the same line of argument.

But it is perfectly clear under *Cummings v. Missouri*, 4 Wall. 323, 18 Law Ed. 356, cited and quoted in our jurisdictional statement, that deprivation of a vested right or imprisonment or fine, is not necessary to punishment as that term is understood with reference to bills of attainder.

The appellees rely very strongly on *Garner v. Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 Law Ed. 1317. That decision has been referred to hereinabove and deals with charter and ordinance provisions of the city of Los Angeles, requiring the filing of oaths or affidavits of public employees having to do with their affiliation with communist or other subversive organizations. If appellees had compelled us to cite decisions only on all fours with the facts, they are certainly not doing what they would compel us to do. In any event, the Garner case is easily distinguishable, and has no application whatsoever to the case at bar, because this court distinctly held that the Charter and Ordinance Provisions there involved merely provided qualifications for public employment, and was therefore not a bill of attainder.

It is entirely likely that the constitutional provisions proscribing bills of attainder in the protections which it affords, overlaps other constitutional protections, and this matter has been discussed in several of the decisions cited. We have not felt that this is the place to go into detailed analysis of a large number of decisions.

On the necessity for trial of a judicial nature before penalties may be imposed, we have hereinbefore devoted some effort. We think it is a requirement not only under Article I, Section 10, proscribing bills of attainder, but it is also a requirement of the due process of law clause of the 14th amendment. We think it is constitutionally required under all circumstances before penalties may be imposed.

We think a substantial question is presented on the issue of bill of attainder.

D. THE QUESTIONS ARE SUBSTANTIAL WITH REFERENCE TO THE "BREADTH" OF APPLICATION OF ANY DECISION OF THIS COURT.

We indicated in our jurisdictional statement that several states have already adopted acts similar to the Hutchinson Act. The following laws similar to the Hutchinson Act are on the books of several states:

Minnesota, Ch. 146, Laws of 1951, effective 3-24-51
New York, Ch. 391, Laws of 1947, effective 3-27-47
Ohio, S. 261, effective 9-20-47
Pennsylvania H. 826; effective 9-1-47

We have no statistics as to the number of employees and political units amenable to the Acts, but manifestly any decision of this Court as to the constitutionality of the Act will be of wide application.

The matter is substantial in that sense certainly.

V.

RELIEF SOUGHT

We ask that appellees' motion to dismiss or affirm be denied, and that the court note jurisdiction.

Respectfully submitted,

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